

(2003) 02 JH CK 0018
In the Jharkhand High Court
Case No : Criminal M.P. NO. 618 of 2002

Ajay Kumar Agarwal and Another	Vs	APPELLANT
State of Jharkhand and Another		RESPONDENT

Date of Decision : 25-02-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 249, 256, 256(2), 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 9
Penal Code, 1860 (IPC) — Section 120B, 420, 468

Citation : (2003) CriLJ 3088 : (2003) AIR Jhar HCR 863 : (2003) 4 AllCriLR 10 : (2003) 2 BankCas 517 : (2003) 2 Crimes 226 : (2003) 2 JCR 178 : (2003) 2 JLJR 368 : (2003) 2 ALT(Cri) 4 : (2003) 2 BC 517 : (2003) 4 RCR(Criminal) 286

Hon'ble Judges : Tapen Sen, J

Bench : Single Bench

Advocate : Prabhas Kumar, for the Appellant; R.S. Majumdar, Government Advocate and Kalyan Roy, for the Respondent

Final Decision : Dismissed

Judgement

Tapen Sen, J.—Heard Mr. Prabhas Kumar, learned counsel for the petitioners; Mr. R.S. Majumdar, learned Government Advocate for the State, and Mr. Kalyan Roy, learned counsel for the Opposite Party No. 2.

2. The instant application invoking the inherent powers of this Court u/s 482 of the Code of Criminal Procedure, 1973 has been filed for quashing the order dated 6.6.2002 passed in Criminal Revision No. 24 of 2002 by the learned Sessions Judge, Koderma by reason whereof he dismissed the Revision Application itself.

3. The Revision Application in turn was filed against the order dated 6.3.2002 passed by the learned Sub-Divisional Judicial Magistrate, Koderma in Case No. 136 of 2000 (T.R. No. 551 of 2002) by which he rejected the petition dated 18.6.2001 filed by these petitioners wherein they had prayed for acquitting them in terms of the provisions contained u/s 256(2) of the Code of Criminal Procedure, 1973 and for discharging them u/s 249 of the said Code. The ground

taken in the petition for acquittal and discharge was that the complainant had died on 6.6.2001, and that cognizance u/s 138 of the Negotiable Instruments Act was barred by limitation.

4. The short facts which are necessary to be taken note of in this case is that on 2.6.2000 one Ratan Lal Chhabra filed complaint case No. 136 of 2000 in the Court of Additional, Chief Judicial Magistrate. Koderma against 5 (five) accused persons including these petitioners. It is relevant to note that accused No. 1 (Ajay Kumar Agarwala) is petitioner No. 1 in this case while the accused No. 2 (Goutam Agarwala) is his son. The complaint petition discloses that both of them as also the wife of Ajay Kumar Agarwala and his other son, i.e., Deepak Agarwala were all made accused persons with a specific statement that both were incharge and responsible in matters relating to the affairs of the company of which accused No. 1 (petitioner No. 1) is the President. The Company is known as M/s. Hi Rise Exports (Pvt.) Ltd. It is also relevant to note that the said Company was also made accused No. 5 in the said complaint case. The allegations contained in the body of the said memo of complaint is that the accused Nos. 1 and 2 (Ajay Kumar Agarwala and his wife Geeta Agarwala - President and Director respectively of the Company) alongwith their staff came to the Complainant's Mica godown at Jhumritilaiya in a car on 1.10.1999 between 3-4 p.m. when he was busy with his workers and was talking to some other persons who had come to purchase mica from his own business premises. It was further alleged that the accused No. 1 in the presence of the accused No. 2 informed the complainant that for the export business of their Company (accused No. 5), they were in dire need of some mica which were available at Giridih. Accordingly, this requested the complainant to sell mica as per their requirements mentioned in paragraph 3 of the Memo of complaint and assured that they would immediately pay the price thereof by 2 (two) account payee cheques of State Bank of India, Giridih Bazar Branch. Further case of the complainant was that he was initially not willing to sell the mica to the accused Nos. 1 and 5 (meaning thereby the President of the Company and the company itself) but on persuasion of the accused No. 1 and also upon his assurance of immediate payment and upon repeated requests, the complainant as alleged was induced to sell mica to them worth Rs. 7,30,000/- (Rupees seven lakh thirty thousand only). The further case of the complainant was that these articles were sold under due pass, challan and bill and in lieu thereof the accused persons issued 2 (two) cheques worth Rs. 5,00,000/- (Rupees five lakh) and Rs. 2,30,000/- (Rupees two lakh thirty thousand) respectively both being dated 1.10.1999 drawn on State Bank of India, Giridih Bazar Branch favouring the complainant. The said cheques were also signed by the petitioner No. 1 in the capacity of the President and also by the accused No. 2 (Geeta Agarwala, his wife) in the capacity of the Director of the said Company (accused No. 5). Thereafter the two cheques were presented for payment before the Bank by the complainant through his Banker, namely, Bank of India, Jhumritilaiya Branch, firstly on 9.11.1999 which were both returned dishonoured with the endorsement "not drawn on us" and were handed over to the

complainant by his Banker on 24.11.1999. Upon being shocked, the complainant contacted the petitioner No. 1 and was advised by him to again present the cheques for encashment in the last week of December, 1999. According to the complainant the second presentation was again made but the cheques were again dishonoured on account of insufficiency of funds. Lastly on being intimated on phone by the petitioner No. 1 to present the cheque for the third time in March, the complainant again presented the two cheques on 13.3.2000 but they were again dishonoured with the endorsement "Cheque Series does not relate to us". The other portions of the complaint need not be gone into in this application u/s 482 of the Code of Criminal Procedure, except to state that upon registration of the petition of complaint by the Additional Chief Judicial Magistrate, Koderma under Sections 420, 468 and 120B of the Indian Penal Code read with Section 138 of the Negotiable Instruments Act, the complaint was dismissed for being time barred on 3.8.2000. Thereafter the complainant moved the learned Sessions Judge, Koderma vide Criminal Revision No. 149 of 2000 and the same was allowed by order dated 24.11.2000 with a direction upon the lower Court to make further inquiry.

5. Thereafter the Additional Chief Judicial Magistrate, Koderma took cognizance under the aforementioned Sections by his order dated 19.2.2001 and transferred the case to the Court of the learned Sub Divisional Judicial Magistrate, Koderma for trial and disposal.

6. The petitioners, being aggrieved with the order taking cognizance, filed Criminal Miscellaneous No. 2883 of 2001 before this Court for quashing the same but that application was dismissed by order dated 9.5.2001 (Annexure 1/1).

7. In the meantime the complainant Ratan Lal Chhabra died on 5/6.6.2001. Upon death of the complainant, the accused persons filed an application (Annexure 2) wherein they prayed that in terms of Section 256(2) of the Code of Criminal Procedure, 1973 read with Section 249 thereof, the accused persons be acquitted and they be discharged.

8. On 9.7.2001, one of the sons of the deceased complainant, namely, Rakesh Kumar Jain filed an application (Annexure 4) wherein he prayed that he being the legal representative and sole heir of the deceased complainant and also being legally entitled to continue in place of his father necessary orders be passed permitting him to continue with the case on his behalf, namely, Ratan Lal Chhabra.

9. By order dated 6.3.2002 the learned Sub Divisional Judicial Magistrate allowed the application and permitted the Opposite Party No. 2 (Rakesh Kumar Jain) to continue with the case on behalf of his father.

10. Being aggrieved by the aforementioned order dated 6.3.2002 the petitioners filed Criminal Revision No. 24 of 2002 before the learned Sessions Judge, Koderma and that Criminal Revision Application was dismissed by him by order dated 6.6.2002 (impugned order herein).

11. Mr. Prabhas Kumar, learned counsel for the petitioners draws attention of this Court to Section 256 of the Code of Criminal Procedure, 1973 which reads as follows :

"256. Non-appearance or death of complainant.--(1) If the summons has been issued on complaint and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall notwithstanding anything hereinbefore contained, acquit the accused unless for some reason he thinks it proper to adjourn the hearing of the case to some other day :

Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2) The provisions of Sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death."

12. He also draws attention to the provisions of Section 249 of the said Code and which reads as follows :

"249. Absence of complainant.--When the proceedings have been instituted upon complaint, and on any day fixed for the hearing of the case, the complainant is absent, and the offence may be lawfully compounded or is not a cognizable offence, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused."

13. Upon perusal of the application filed by the petitioners vide Annexure 2 it is also apparent that the petitioners relied upon Section 249 as also aforesaid Section 256(2) of the Code of Criminal Procedure.

14. Before dealing with Section 256 of the Code of Criminal Procedure, it would be relevant to deal with Section 249 of the Code of Criminal Procedure first. The provisions of Section 249 of the Code of Criminal Procedure makes discharge of an accused possible in three contingencies and they are :--

- (a) When the complainant is absent;
- (b) When the offence is compoundable; and
- (c) When the case relates to a non-cognizable offence.

15. In the instant case cognizance has also been taken under Sections 420 and 468 of the Indian Penal Code. So far as Section 420 of the Indian Penal Code is concerned, the punishment may extend to 7 (seven) years and similarly for an offence u/s 468 of the Indian Penal Code the punishment may also extend up to 7 (seven) years. Both the cases are cognizable and non-bailable. While Section 420 is compoundable, Section 468 is non-compoundable.

16. In that view of the matter, the application filed taking advantage of Section 249 of the Code of Criminal Procedure was itself misconceived inasmuch as Section 249 of the Code of Criminal Procedure did not apply at all, the sections being cognizable and Section 468 being non-compoundable.

17. So far as Section 256 Clause (2) of the Code of Criminal Procedure is concerned, this Court is not inclined to accept the submissions of the learned counsel for the petitioner that upon death of the complainant it would be deemed to be his non-appearance on account of death and therefore, the accused persons become entitled to acquittal. Section 256 of the Code of Criminal Procedure is a discretionary statute which vests a discretion upon the Magistrate to proceed with the trial either in the absence or death of the complainant. He also has the discretion that where a complainant is represented by a Lawyer/Pleader who conducts the prosecution on his behalf and where the Magistrate is of the opinion that personal attendance is not necessary, then he may dispense with the attendance and proceed with the case. The same analogy must also be therefore accepted in the case of a complainant who dies. What is important in the instant case is that it was initiated on the basis of a complaint which was filed through a Lawyer who becomes the Officer conducting the case on behalf of the complainant and therefore the Trial Magistrate had every right to continue with the case even in the absence of the complainant. Additionally when the son of the complainant has stepped in and wanted to continue with the case. Section 256(2) of the Code of Criminal Procedure could not have come to the rescue of the accused persons in any manner whatsoever. Reference in this context may be made to the case of *Helen C. Pinheiro and Others Vs. Kamaxi Steel Products*, .

18. The learned counsel for the petitioners has further submitted that a new complainant could not have been sub-stituted because the entire transaction was on a person to person basis and the person aggrieved was Ratan Lal Chhabra and after his death his personal grievances could not have been continued by a new complainant. This Court rejects the aforesaid submission of the learned counsel for the petitioner and in this context Mr. Kalyan Roy, learned counsel for the opposite party No. 2 refers to the case of *Ashwin Nanubhai Vyas Vs. State of Maharashtra and Another*, Paragraph 7 of the said Judgment reads as follows :

"(7) Mr. Keswani contends that the Presidency Magistrate has made a "substitution" of a new complainant and there is nothing in the code which warrants the substitution of one complainant for another. It is true that the Presidency Magistrate has used the word "substitute" but that is not the effect of the order. What the Presidency Magistrate has done is to allow the mother to act as the complainant to continue the prosecution. This power has undoubtedly possessed by the Presidency Magistrate because of Section 495 of the Code by which Courts are empowered (with some exceptions) to authorize the conduct of prosecution by any person. The words "any person" would indubitably include the mother of the complainant in a case such as this, Section 198 itself contemplates that a complaint may be made by a person other than the person

aggrieved and there seems to us no valid reason why in such a serious case we should hold that the death of the complainant puts an end to the prosecution."

19. Drawing the same analogy, this Court is also satisfied that the opposite party No. 2 had all the necessary jurisdiction to continue with the case and holds that the death of the complainant could not have terminated the prosecution and that too, in such a serious case. Another important aspect in this case is that the allegations made in the complaint is that the cheques were issued in the presence of so many persons and that they bounced upon presentation on three occasions. Therefore, the important features which are to be proved are issuance of the cheques, dishonour of the cheques and these could have been proved even in the absence of the complainant being represented by his lawyer. Therefore, by induction of the son of the complainant after his death cannot be said to create a situation In favour of the accused persons claiming acquittal or discharge. The mere death of a complainant cannot ipso facto terminate the criminal proceeding. Reference in this context may be made, as cited by Mr. R.S. Majumdar, learned Government Advocate to the case of Ashok Kumar Vs. Abdul Latif and Others, .

20. Mr. R.S. Majumdar also rightly relies upon another judgment in the case of M. Govindaiah Naidu v. Y. Kamalamma, reported in 1984 CriLJ 1326. In that case the Andhra Pradesh High Court also came to a specific conclusion that there is no foundation for the proposition that a prosecution ends on the death of a complainant in a criminal case and that criminal proceeding legally instituted do not terminate or abate merely on the death of the complainant.

21. Mr. Prabhas Kumar, learned counsel for the petitioner relied upon the case of Ratan Singh and Others Vs. Chain Singh, in support of his contention to the effect that upon death of the complainant the proper course to be adopted by the Magistrate was to discharge the accused. This Court does not agree with the submission of the learned counsel for the petitioner because in the case cited by him, the offence alleged was defamation and prosecution was also for defamation. Defamation is an act which affects or imputes either by words spoken or read or by signs, visible representations, any derogatory comments which is intended to harm the reputation of a person. If the person who considers himself to have been defamed, becomes a complainant and, if he dies, then perhaps, the proceeding should be allowed to terminate because it is a matter of a very personal injury to his own reputation. That analogy however cannot be drawn not extended within the parameters of this case.

22. Mr. Prabhas Kumar further relies upon a judgment passed in the case of Koya Moideen v. Hariharan, in support of the contention that a substituted complainant cannot be said to be the "holder in due course" as defined under the provisions of Section 9 of the Negotiable Instruments Act. This Court rejects the aforesaid contention of the learned counsel for the petitioner on the ground that from the allegations made in the Memo of complaint it is apparent that the complainant himself, was the owner of a business house dealing in mica and he/his company

sold a huge amount of mica to the accused persons worth Rs. 7,30,000/- (Rupees seven lakh thirty thousand). The right to receive the amount by his business house cannot be frustrated by technicalities of the definitions as recorded in the Negotiable Instruments Act because his own business house also must be deemed to be beneficiaries of the cheques and therefore his son will also be deemed to be the "holder in due course". He is, himself, a business man and runs a business house as discussed in paragraph 1 of the Memo of complaint and therefore his son who is successor to that business must also be deemed to be "holder in due course", especially, more so, in view of the reasons stated in paragraph 3 of his own petition (Annexure 4) which discusses that he is the sole heir of Ratan Lal Chhabra.

23. Lastly, this Court is also not willing to interfere in this case because this is an application invoking the inherent powers of this Court u/s 482 of the Code of Criminal Procedure in which prayer for quashing of the order dated 6.6.2002 has been made. It is relevant to mention that the aforementioned order was passed in a Revision Application and therefore this Application virtually amounts to a second Revision Application. In fact, this actually amounts to a second Revision Application and therefore in view of the settled law that inherent powers u/s 482 of the Code of Criminal Procedure cannot be utilized in such cases, this Court is not willing to interfere. Reference in this context may be made to the case of Dharampal and others Vs. Smt. Ramshri and others, , where it has been held that the inherent powers u/s 482 of the Code cannot be utilized for exercising powers which are expressly barred by the Code itself u/s 397(3) thereof.

24. For the foregoing reasons, therefore, this Court holds that there is no merit in this Application. It is accordingly, dismissed. The interim order passed on 20.1.2003, is consequently vacated.